



# THE NEW HOLY TRINITY

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THERE'S A FAMILIAR STORY about statutory interpretation in the Supreme Court.<sup>1</sup> Once upon a time, the Court cared primarily about legislative purpose, even if it defied clear statutory text. But then Antonin Scalia came to town, became a justice, and laid down a new law: textualism. Legislative purpose is largely a fiction, Scalia argued, and even if it were real, text would be the only a reliable evidence of its content. The era of “New Textualism” had dawned.

Central to Scalia's success was his association of purposivism with a century-old precedent called *Holy Trinity*. Not only did *Holy Trinity* expressly elevate purpose over text, but it also rested its purposive reasoning on an objectionable view of law and religion, noting for instance that “this is a Christian nation.”<sup>2</sup> So if *Holy Trinity* was right, then a lot of people would rather be wrong. Or so went the prevailing view. It didn't happen in a day or a year, but eventually *Holy Trinity* was overthrown.

Recently, however, purposivism seems to have evolved and, as a result, to have gotten the upper hand.<sup>3</sup> Instead of adhering to the

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<sup>1</sup> See, e.g., John F. Manning, *The New Purposivism*, 2011 SUP. CT. REV. 113, 113-15 (2011).

<sup>2</sup> *Holy Trinity Church v. United States*, 143 U.S. 457, 471 (1892).

<sup>3</sup> For related commentary, see Marty Lederman, *Textualism? Purposivism? The Chief*

New Textualism, the Roberts Court has repeatedly and visibly embraced what might be called “The New Holy Trinity.”<sup>4</sup> This approach calls for consideration of non-textual factors when determining how much clarity is required for a text to be clear. Aptly enough, the New Holy Trinity is itself triply trinitarian. It revitalizes the jurisprudential legacy of the original *Holy Trinity*. It is exemplified by three recent Supreme Court cases. And it rests on attention to three considerations: text, pragmatism, and purpose.

To some extent, the New Holy Trinity is an extension of previous doctrinal trends.<sup>5</sup> In the last few years, the Roberts Court has made creative use of the avoidance canon, which calls for the Court to interpret statutes to avoid asserted constitutional problems. I myself have written on that trend, as have others.<sup>6</sup> But we commentators just report the game. We don’t call the plays. So it should be no surprise that the Roberts Court has kept ahead of the law reviews. Now, instead of limiting itself to avoidance, the Court avoids undesirable textual results without invoking the Constitution at all. Indeed,

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*Justice Comes Down on the Side of Interpretive Pragmatism*, SLATE (June 25, 2015); Rick Hasen, *King v. Burwell: The Return of “Purpose” in Statutory Interpretation*, ELECTION LAW BLOG (June 25, 2015); Michael Dorf, *Why Can’t Consequences Create Ambiguity?*, DORF ON LAW (June 4, 2014).

<sup>4</sup> The argument here differs from John Manning’s claim, now several years old, that the Roberts Court was exhibiting adherence to “the New Purposivism.” See Manning, *supra* note 1, at 114-15. The New Purposivism resembles the New Textualism in that it honors clear text, viewing it as a “trump” – but that is precisely the approach that the New Holy Trinity has now called into question. *Id.*

<sup>5</sup> The New Holy Trinity may be discernible in older decisions that honored textualism more in word than deed. For instance, in *Zuni Public School District No. 89 v. Department of Education*, 550 U.S. 81 (2007), Justice Stephen G. Breyer’s majority opinion discussed the statute’s “basic purposes” before finding textual ambiguity. *Id.* at 90. Though Breyer eventually emphasized that clear text must control, *id.* at 93, his order of analysis prompted six justices to object that text had gotten short shrift. See *id.* at 107 (Kennedy, J., concurring); *id.* at 108 (Scalia, J., dissenting); *id.* at 123 (Souter, J., dissenting). Cf. *id.* at 106 (Stevens, J, concurring) (defending the result on openly purposive grounds).

<sup>6</sup> Richard M. Re, *The Doctrine of One Last Chance*, 17 GREEN BAG 2D 173 (2014); Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109 (2015).

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the Court sometimes seems to go out of its way to avoid using avoidance in statutory cases. This apparent methodological shift merits attention.

The New Holy Trinity may have deeper implications. Not just statutory but also constitutional interpretation often implicates the distinction between clarity and ambiguity. But how much clarity is required before declaring that a constitutional provision is clear, as opposed to ambiguous? In answering this question, the Court sometimes thinks about purpose and pragmatism. The New Holy Trinity embraces this approach, whereas the New Textualism resists it.

### I. THE CASES

The three recent and high-profile Supreme Court cases discussed below all rested on a finding of textual ambiguity. In that sense, the three cases are textualist. However, the Court's ambiguity findings in these cases all depended at least in part on purposive or pragmatic judgments. And then, having already used purposive or pragmatic reasons to find ambiguity, the Court proceeded to resolve that ambiguity based on – additional purposive or pragmatic considerations. This is the New Holy Trinity in action.

#### *A. Bond v. United States*

It is a federal crime knowingly to use a “chemical weapon,” where that term is defined to mean a toxic chemical that is not being used for a permissible purpose. In *Bond v. United States*,<sup>7</sup> there was no serious question that the defendant had knowingly used a toxic chemical and that she had not done so for a permissible purpose. One might have expected the Court's statutory analysis to end there. Instead, a six-justice majority held that the statute didn't reach the unusual facts of the defendant's offense.

And those facts were indeed unusual. Jealous that her husband was having a child with her former friend, Carol Anne Bond had

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<sup>7</sup> See *Bond v. United States*, 134 S. Ct. 2077, 2085 (2014) (citing 18 U.S.C. § 229(a); 18 U.S.C. § 229F(1)(A)).

applied a rash-causing toxin to the ex-friend's car, front-door handle, and mailbox, with little harmful effect. *Bond* held that these bizarre actions didn't rise to the level of a federal crime – much less to the level of a federal crime relating to the Chemical Weapons Convention. The Court offered an illustration, literally: whereas the “horrors of chemical warfare were vividly captured by John Singer Sargent in his 1919 painting *Gassed*,” “[t]here are no life-sized paintings of *Bond*'s rival washing her thumb.”<sup>8</sup>

But what about the text? At the outset, the Court demanded a clear statutory statement before applying federal criminal law to such peculiar facts. “The problem” with the government’s “simple” reading of the statute was thus “that it would dramatically intrude upon traditional state criminal jurisdiction, and we avoid reading statutes to have such reach in the absence of a clear indication that they do.”<sup>9</sup> This line of reasoning suggested that the law was unclear in part because of its federalism implications.

Later, and perhaps equivalently, the Court discussed “basic principles of federalism” not as a clear statement rule but rather as means “to resolve ambiguity.” In *Bond* itself, the Court continued, “the ambiguity derives from the improbably broad reach of the key statutory definition[,] the deeply serious consequences of adopting such a boundless reading; and the lack of any apparent need to do so.”<sup>10</sup> So *Bond* expressly held that “ambiguity derives from” a series of purposive and pragmatic conclusions.

*Bond* is a lot like the New Textualism’s old nemesis. In *Holy Trinity*, a statute by its terms seemed to prohibit entering into a contract for an alien to immigrate to and work within the United States. But the Court held that the law was supposed to bar “cheap, unskilled labor” and so didn’t apply to a church’s contract to “import” a minister.<sup>11</sup> Likewise, *Bond* held that a federal law that implemented the Chemical Weapons Convention was supposed to address problems implicating

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<sup>8</sup> *Id.* at 2083, 2093.

<sup>9</sup> *Id.* at 2088 (alteration and internal quotation marks omitted).

<sup>10</sup> *Id.* at 2090.

<sup>11</sup> See *Holy Trinity*, 143 U.S. at 464-65.

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national security and so didn't reach "minor" assaults. In other words, *Bond* paralleled *Holy Trinity* in limiting the relevant statute's scope to its apparent purpose.

In his separate opinion, Scalia argued that the statutory text was "plain" and emphasized the majority's unusual willingness to find ambiguity for reasons outside the text. Accusing the Court of having embraced a "judge-empowering principle," Scalia mockingly declared that "[w]hatever has improbably broad, deeply serious, and apparently unnecessary consequences . . . is *ambiguous!*"<sup>12</sup> Just so. That proposition – which Scalia found preposterous – could serve as the New Holy Trinity's credo.

### *B. Yates v. United States*

You might think that the phrase "tangible object" means an object that is tangible. And that is in fact how the phrase is construed in many criminal rules and statutes. Indeed, arriving at that commonsense conclusion "should be easy" for any textualist.<sup>13</sup> Yet a fractured five-justice majority in *Yates v. United States* chose to read the statutory language as limited to tangible objects that also "record or preserve information."<sup>14</sup>

Justice Ruth Bader Ginsburg wrote a four-justice plurality opinion, and it relentlessly emphasized statutory purpose. The plurality opened by discussing the "principal evil motivating" the law, as demonstrated by the New Textualism's ultimate bugaboo: legislative history. The plurality then briefly acknowledged the relevance of "dictionary definitions," but not before emphasizing that ambiguity turns on "context," such that the same terms can have different meanings in different places. The plurality explained that "the meaning" of a text "well may vary to meet the purposes of the law." And the plurality distinguished other sources of law with the same text

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<sup>12</sup> *Bond*, 134 S. Ct. at 2096 (Scalia, J., concurring in the judgment).

<sup>13</sup> *Yates v. United States*, 135 S. Ct. 1074, 1091 (2015) (Kagan, J., dissenting).

<sup>14</sup> *Id.* at 1079 (plurality opinion).

based on what they were “designed” to do.<sup>15</sup> Under the banner of context, *Yates* honored purpose.

The *Yates* plurality also accentuated the odd facts at issue and so mimicked the purposive reasoning of *Holy Trinity* and *Bond*. The law at issue had prohibited the destruction of certain “tangible objects” in order to crack down on white-collar document destruction, yet the defendant in *Yates* was a fisherman accused of throwing illegally caught fish overboard. In one of several maritime puns, the plurality concluded that “it would cut [the statute] loose from its financial-fraud mooring to hold that it encompasses any and all objects.”<sup>16</sup>

The plurality eventually turned to a separate, more textually oriented section of its reasoning – but even that discussion started out on a decidedly purposive note. Instead of focusing on the statutory provision at issue, the plurality “first” emphasized the relevant statutory captions, which supplied “cues” regarding Congress’s intent. Justice Elena Kagan’s dissent lambasted this move on the ground that the Court had never previously discussed captions before operative statutory language.<sup>17</sup> In that regard, the plurality outdid *Holy Trinity* itself, which had drawn attention to statutory titles but only after engaging the text.<sup>18</sup> Unconcerned with its methodological novelty, the plurality concluded that “one would have expected a clearer indication” if Congress had wanted its statute to sweep broadly.<sup>19</sup> The case thus seemed to have been decided.

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<sup>15</sup> *Id.* at 1081-83 (internal quotation marks and citations omitted); *see also id.* at 1084 (providing additional discussion of “legislative history”).

<sup>16</sup> *Id.* 1079 (plurality opinion). Meanwhile, Justice Samuel A. Alito’s fifth-vote concurrence sought to frame the plurality’s purposive conclusion in more textualist terms, such as by emphasizing *ejusdem generis* and other textual canons. Yet Alito ended up finding ambiguity based on points similar to the plurality’s. For instance, Alito’s first argument echoed *Holy Trinity* and *Bond* in emphasizing the purposive oddity of applying the statute to the facts at hand. *See id.* at 1089 (Alito, J., concurring in the judgment) (“A fish does not spring to mind . . .”).

<sup>17</sup> *See id.* at 1083 (plurality opinion); *id.* at 1094 (Kagan, J., dissenting).

<sup>18</sup> *See Holy Trinity*, 143 U.S. at 462.

<sup>19</sup> *See Yates*, 135 S. Ct. at 1083 (plurality opinion).

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Only then – in what reads like an epilogue – did the plurality finally discuss the textualist canons, such as *ejusdem generis*. By that point, the plurality’s purposive analysis had already created textual ambiguity, and possibly resolved it as well.<sup>20</sup>

### *C. King v. Burwell*

By its terms, the Affordable Care Act affords subsidies only to healthcare markets “established by the State” in which the market operates.<sup>21</sup> The statute expressly defines “State” to exclude the federal government and repeatedly uses the distinct terms “State” and “Federal” according to their normal meaning. What’s more, the entire phrase “established by the State” concededly does no work – unless it’s given its normal meaning.<sup>22</sup> Once again, the issue seemed easy, if judged by the New Textualism.<sup>23</sup> Yet six justices concluded in *King v. Burwell* that “established by the State” effectively means established by the State *or the Federal government*.

The Chief Justice’s majority opinion started not with the statutory text but rather with a kind of legislative history. In a discussion spanning over three pages, the Chief discussed the evolution of health insurance regulation since “the 1990s,” even though none of those measures was at issue in the case. This windup established that laws related to the statute at issue “were to designed to” pursue a certain “goal” – namely, to expand health insurance coverage by providing subsidies to all people legally obligated to purchase insur-

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<sup>20</sup> *Id.* at 1086. Channeling the New Textualism, the dissent insisted that “this Court uses *noscitur a sociis* and *ejusdem generis* to resolve ambiguity, not create it.” *Id.* at 1097 (Kagan, J., dissenting).

<sup>21</sup> See 26 U.S.C. §§ 36B(b)-(c).

<sup>22</sup> See *King v. Burwell* 135 S. Ct. 2480, 2492 (2015) (explaining that the Court’s “preference for avoiding surplusage constructions is not absolute.” (internal quotation marks and citation omitted)).

<sup>23</sup> See Noah Feldman, *Justices Drop Another Clue About Obamacare’s Future*, BLOOMBERG VIEW (Apr. 22, 2015) (“The uncomfortable truth (for liberals, at least) is that the ACA case arises from a piece of statutory language that on its face explicitly says that tax subsidies are only available for health insurance purchased on an exchange ‘established by the state.’”).

ance.<sup>24</sup> That asserted goal straightforwardly cut in favor of subsidies for all healthcare markets – whether established by states or the federal government.

When it turned to the critical issue of how to construe “established by the State,” the Court immediately asserted “a problem,” namely, that the “most natural reading” of that phrase would preclude the existence of “‘qualified individuals’ on Federal Exchanges.” That result was in tension with another provision’s requirement that all Exchanges “‘make available qualified health plans to qualified individuals’ – something an Exchange could not do if there were no such individuals.”<sup>25</sup>

But as Scalia’s dissent pointed out, there is nothing textually untenable about thinking both that Federal Exchanges lacked “qualified individuals” and that State and Federal Exchanges must “make available qualified health plans to qualified individuals.”<sup>26</sup> In many situations, people are happy rather than alarmed to find that contingent obligations (“Send all troublemakers to the principal’s office”) are never actually triggered. Only the Court’s understanding of Congress’s purpose created a reason to think that *this* contingent obligation (“make available qualified health plans to qualified individuals”) had to be triggered.

The Court again relied on purposivism when it asserted that certain provisions “assumed” subsidies would flow to healthcare markets established by the federal government. The phrase “established by the State” couldn’t simply mean what it said, since “[i]f tax credits were not available on Federal Exchanges, these provisions would make little sense.” That conclusion avowedly rested not on the text but rather on the Court’s view of what would “make . . . sense,” as the dissent again pointed out.<sup>27</sup>

Finally, the Court admitted that its effort to make the statute make sense rendered the phrase at issue a perfect nullity, but

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<sup>24</sup> See *King*, 135 S. Ct. at 2485.

<sup>25</sup> See *id.* at 2490.

<sup>26</sup> See *id.* at 2501 (Scalia, J., dissenting).

<sup>27</sup> See *id.* at 2492 (majority opinion). But see *id.* at 2500 (Scalia, J., dissenting).

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chalked it up to “inartful drafting.” In fact, the Court accused Congress of failing to demonstrate “the type of care and deliberation that one might expect of such significant legislation.”<sup>28</sup>

Having used purposive argument to find textual ambiguity (and criticize a coordinate branch of government), the Court returned to the hapless legislature’s good intentions. It was “implausible that Congress meant the Act to operate” in the “manner” that its text would suggest. While the “plain meaning” argument was admittedly “strong,” the Court favored the reading that would “avoid the type of calamitous result that Congress plainly meant to avoid.” This conclusion honored “the legislative plan.”<sup>29</sup> So after opening with purposive history and then proceeding to a purposive finding of ambiguity, *King* closed out with a purposive crescendo.

The dissent was wrong to call the majority’s reasoning “absurd.”<sup>30</sup> But *King* did deviate from the New Textualism.

## II. THE EXPLANATION

Assuming that the New Holy Trinity is a meaningful label to affix to the cases just described, why is the Court so visibly exhibiting this approach now?

One possibility is that the New Holy Trinity is an outgrowth of the Court’s recent experiments in constitutional avoidance. The justices, particularly Chief Justice John G. Roberts, Jr., have grown used to playing fast and loose with statutory text, courtesy of avoidance.<sup>31</sup> Perhaps that experience has bred a habit, and statutory text has come to seem like less of a constraint in general, even in cases unrelated to avoidance. If that’s right, then we should expect a general decline in textualist argument across the board.

Alternatively, the New Trinity might be constitutional reasoning disguised as statutory interpretation. *Bond* extolled the “constitutional”

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<sup>28</sup> See *id.* at 2492 (majority opinion).

<sup>29</sup> See *id.* at 2494-96.

<sup>30</sup> See *id.* at 2496 (Scalia, J., dissenting).

<sup>31</sup> See, e.g., *Northwest Austin Mun. Utility Dist. v. Holder*, 129 S. Ct. 2504 (2009).

foundation of the federalism principle it invoked, and *Yates* could be understood as being tacitly based on due process and notice.<sup>32</sup> On its face, *King* doesn't rest on the Constitution, but it does reject *Chevron* for reasons that sound in non-delegation; and at oral argument, Justice Anthony M. Kennedy seemed worried that a literal reading of the statute would coerce states.<sup>33</sup> But this rationalization becomes harder to sustain as the examples accumulate, particularly since each case seems to go out of its way to avoid resting on the Constitution.

Another possibility is that the New Holy Trinity should cause us to view the Court's earlier avoidance cases in a new light. I've previously argued that the Roberts Court has used a special version of avoidance to give notice that it might soon issue disruptive rulings.<sup>34</sup> If that's right, then pragmatism always underlay avoidance in the Roberts Court. Over time, perhaps the Court gradually discovered pragmatic reasons not just to use avoidance, but to avoid it as well. Indeed, the Court might have turned to the New Holy Trinity in part because avoidance risked giving too strong of an impression that a disruptive ruling was in the offing. In *Bond*, for instance, the majority coalition likely had different views of the constitutional issue and so may have been trying to moderate the impression that it planned to revolutionize doctrine in that area.

Finally, the New Holy Trinity might reflect a refinement of the median justices' views on statutory interpretation. It's time to consider what those views might be.

### III. THE THEORY

The Court hasn't announced that it's entered a new interpretive period, but its decisions do suggest the outlines of an interpretive approach.

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<sup>32</sup> *Bond*, 134 S. Ct. at 2088; Richard M. Re, *Stuntz's Presence in Yates*, PRAWFBLAWG (Mar. 2, 2015).

<sup>33</sup> See *King*, 135 S. Ct. at 2489; Transcript in *King v. Burwell*, No. 14-114, at 49 (Mar. 4, 2015).

<sup>34</sup> See Re, *supra* note 6.

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The easiest way to describe this theory is to contrast it with thoroughly atextual approaches. At least as caricatured, the Old Holy Trinity maintained that even concededly clear statutory text must give way to legislative purpose. In principle, then, text had no determinative analytical force, and a court might as well begin and end its analysis by ascertaining the relevant purpose and rewriting the statute accordingly. Some older opinions may even read that way.

Under the New Holy Trinity, by contrast, text continues to play a meaningful role. It's just that the script calls for an ensemble cast. The key move is to view purposive and pragmatic considerations as relevant to the identification of textual clarity or ambiguity. Far from eliminating textual considerations or rendering them categorically subordinate to purpose, the New Holy Trinity follows the New Textualism in viewing text as a real constraint on interpretation. If a reading has no textual support, then no amount of pragmatism or purpose can carry the day. Yet the degree of textual support demanded isn't set until other considerations have been identified and accounted for. In other words, purposive and pragmatic considerations help set the Court's interpretive expectations and so inform the Court's textualist judgment.

Imagine that a text strongly favors Reading A but that Reading B also has non-frivolous textual support. A New Textualist might announce that Reading A is clearly correct, thereby rendering irrelevant the avoidance canon, *Chevron*, and other ways of resolving ambiguity. A New Holy Trinitarian, by contrast, would resist deciding what is the clear or best reading based on text alone. Instead, the Trinitarian would consider purpose and pragmatism when deciding how high to set the bar for textual clarity. And if the Trinitarian concluded that the relevant law is ambiguous, then an additional purposive reason, or some other way of resolving the ambiguity, would have to come into play. So even after accounting for strong opposing arguments from purpose and pragmatism, the Trinitarian might still conclude that Reading A is the clear or best reading. In that sense, text still plays a constraining role under the New Holy Trinity.

This isn't the place for a comprehensive assessment of the New Holy Trinity, which implicates many classic debates on statutory

interpretation. Yet there are some obvious sources of appeal and alarm. On the up side, the New Holy Trinity offers a way of preserving distinctively textual constraints on interpretation while also leaving analytical room to give in to the persuasive force of purposivism and pragmatism. On the down side, the New Holy Trinity affords the Court even greater power and discretion than the amount already afforded under the controversial avoidance canon and so increases the risk of biased, insincere, and unexpected rulings. In short, the New Holy Trinity contributes to a very old debate, without resolving it.

If I were to make a pitch for the New Holy Trinity it would be this. The New Textualists have emphasized that unyielding respect for clear statutory language honors past legislative compromises and so facilitates future legislative bargaining, while purposive and pragmatic thinkers emphasize the utility of intelligent rather than blind obedience to legislative dictates.<sup>35</sup> The New Holy Trinity strives to get the best of both worlds. It aims to adhere to clear text when it's the product of deliberate compromise, but not when it springs from an inattentive mistake.

#### IV. THE CONSTITUTION

There is more at stake here than statutory interpretation, since the move underlying the New Holy Trinity can be made with respect to any text, including the Constitution.

Take the idea of constitutional “liquidation.” As described by James Madison in Federalist 37, liquidation is the idea that all laws, “though penned with the greatest technical skill,” are necessarily “obscure and equivocal” in some respects, until they become specified through “a series of particular discussions and adjudications.”<sup>36</sup> Madison was concerned with the unavoidable problem of textual ambiguity. But whenever there is ambiguity to be resolved, there is

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<sup>35</sup> Compare John F. Manning, *Textualism and the Equity of the Statute*, 101 COLUM. L. REV. 1 (2001), with RICHARD A. POSNER, *THE PROBLEMS OF JURISPRUDENCE* 268 (1990).

<sup>36</sup> THE FEDERALIST No. 37 (Madison).

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also a prior analytical opportunity to define the relevant ambiguity in light of purposive and pragmatic considerations. So liquidation raises the possibility of applying the New Holy Trinity framework in the context of constitutional interpretation. On that view, purpose and pragmatism would create constitutional ambiguity that long-standing practice might then resolve.

Notably, the only recent Supreme Court decision to cite Madison's liquidation framework, *Noel Canning v. NLRB*,<sup>37</sup> was also eager to consider purposive and pragmatic considerations when interpreting the Constitution's Recess Appointments Clause. Near the start of its analysis, the Court described its interpretive goal in avowedly purposive terms: "We seek to interpret the Clause as granting the President the power to make appointments during a recess but not offering the President the authority routinely to avoid the need for Senate confirmation."<sup>38</sup> That conclusion appears well before the Court found textual ambiguity. By contrast, Scalia's separate opinion applied something like the New Textualism. For instance, Scalia asserted that a "sensible interpretation of the Recess Appointments Clause should start" with a textual premise – namely, "by recognizing that the Clause uses the term 'Recess' in contradistinction to the term 'Session.'"<sup>39</sup> In Scalia's view, the Clause should have been viewed as clear based on its text alone, without regard to purposive and pragmatic considerations.

Interestingly, Chief Justice Roberts may champion the New Holy Trinity only in statutory cases, not constitutional ones. *Noel Canning* provides an example, as the Chief joined Scalia's vigorously textual

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<sup>37</sup> 134 S. Ct. 2550, 2560 (2014) (citing Letter to Spencer Roane (Sept. 2, 1819), in 8 WRITINGS OF JAMES MADISON 450 (G. Hunt ed. 1908)). Also consider *Brown v. Board of Education*, 347 U.S. 483 (1954), which set aside historical evidence of original constitutional meaning only after finding it relevantly ambiguous. Perhaps that finding of ambiguity was or should have been informed not just by the text and historical evidence, but also by the case's practical stakes. See also Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213 (2015) (making similar points in connection with "the new originalism").

<sup>38</sup> 134 S. Ct. at 2559.

<sup>39</sup> *Id.* at 2595 (Scalia, J., concurring in the judgment).

dissent in that case. For an even more recent example, consider *Arizona State Legislature v. Arizona Independent Redistricting Commission*.<sup>40</sup> Construing the Election Clause’s reference to “the Legislature” of a state,<sup>41</sup> the Court held that the phrase encompasses not just representative assemblies but also the public acting through referendum. Justice Ginsburg’s five-justice majority opinion went long on purpose rather than text. In that respect, Ginsburg’s *Arizona* opinion closely resembled her prior opinion for the Court in *Yates*, which the Chief had joined.

Yet the Chief forcefully dissented in *Arizona* – with Scalia’s enthusiastic approval. There are several stark contrasts between the Chief Justice’s reasoning in *King* and *Arizona*. Whereas *King* had disclaimed any need to read the “established by the State” phrase consistently across the statute, the Chief’s *Arizona* dissent demanded textual consistency across the Constitution.<sup>42</sup> His *Arizona* dissent also criticized the Court for relying on the Constitution’s broad democratic purposes, on the ground that the precise constitutional text reflected a “compromise” that courts must respect. Indeed, the Chief asserted that the majority’s approach in *Arizona* would “erase the words” of the Elections Clause and so commit “a judicial error of the most basic order”<sup>43</sup> – a far cry from his express willingness to nullify a statutory phrase in *King*.

Perhaps the Chief Justice simply prioritizes text when he can and other considerations when he must. Or maybe the Chief thinks that the Constitution, unlike most statutes, is indeed a “*chef d’oeuvre*” of

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<sup>40</sup> 135 S. Ct. 2652 (2015).

<sup>41</sup> U.S. CONST. Art. I, § 4, cl. 1.

<sup>42</sup> Compare *King*, 135 S. Ct. at 2493 n. 3 (explaining that “the presumption of consistent usage readily yields to context” and that the Court would “not address” other statutory provisions using the same language (internal quotation marks and citation omitted)), with *Arizona*, 135 S. Ct. at 2680 (Roberts, C.J., dissenting) (arguing at length that the Constitution “includes seventeen provisions referring to a State’s ‘Legislature’” and that “[e]very one of those references is consistent with the understanding of a legislature as a representative body”).

<sup>43</sup> *Id.* at 2684, 2687 (Roberts, C.J., dissenting).

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legislative draftsmanship” whose every word is entitled to respect.<sup>44</sup> Whatever the reason, the Chief seems prepared to follow the New Holy Trinity when it comes to statutes, but not the Constitution – at least, not yet.

### V. THE CONCLUSION

Interpreters must decide how much textual clarity is necessary to make a text clear. The New Textualism meets that need through a rule: legal ambiguity must be discoverable in text alone. By contrast, the New Holy Trinity would embrace a standard: legal ambiguity can spring from a mix of text, purpose, and pragmatism.

These two approaches usually arrive at the same place. Most textualist readings don’t threaten shocking effects or disruptive consequences. The text is therefore honored as the best evidence of legislative goals, even if the result seems unprincipled or unwise. In those banal cases, a banal textualism reigns supreme.<sup>45</sup>

But when a statute’s central objective is at risk or an otherwise plausible reading leads to alarming results, believers in the New Holy Trinity hold the text to a higher-than-normal standard. In those unusual but pivotal cases, banal textualism stands aside, and a more dynamic mode of interpretation takes command.



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<sup>44</sup> *King*, 135 S. Ct. at 2493 n. 3 (internal quotation marks and citation omitted).

<sup>45</sup> *E.g.*, *Whitfield v. United States*, 135 S. Ct. 785 (2015); *Jesinoski v. Country Wide Home Loans*, 135 S. Ct. 790 (2015).